Supreme Court, U.S.
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No. 94-8842

In The

Supreme Court of the United States

October Term, 1995

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE PROPER APPROACH TO REVIEWING DEPARTURES UNDER THE UNITED STATES SENTENCING GUIDELINES, AND AFFIRM THE DISTRICT COURT'S 8 LEVEL DOWNWARD DEPARTURE BASED ON VICTIM PROVOCATION (5 LEVELS) AND A COMBINATION OF THREE NON-PROHIBITED, NON-ENUMERATED FACTORS (3 LEVELS), WHERE, AS HERE, THE FINDINGS OF FACT SUPPORTING THE DEPARTURE ARE SUPPORTED BY THE RECORD

Sub-Issues Fairly Included

1. Should the circuit court adopt and apply its own criteria for "appropriate" grounds for departure, or must it affirm any ground for departure that is neither prohibited by statute nor specifically discouraged by the United States Sentencing Guidelines themselves?

2. Is the district court in a unique position to determine that a complex of non-prohibited factors justify departure at a particular level based on how those factors fit together, converge and influence each other?

3. When the circuit court reviews the application of an "encouraged" ground for departure, should it focus on the "real offense" or "charge offense" in determining if the case is in the "heartland" as that term is used by the United States Sentencing Commission?

PARTIES TO THE PROCEEDINGS

This case is consolidated with *Koon* v. *United States*, Case Number 94-1664.

As consolidated, the parties to this proceeding are:

Laurence M. Powell, Petitioner. Mr. Powell was the Defendant in the District Court and the Appellant and Cross-Appellee in the Circuit Court.

Stacey C. Koon, Petitioner. Mr. Koon was also a Defendant in the District Court and an Appellant and Cross-Appellee in the Circuit Court.

The United States of America, Respondent. The United States was the Plaintiff in the District Court and the Cross-Appellant and Cross-Appellee in the Circuit Court.

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The sentencing opinion of the district court is reported at 833 F.Supp. 769. 1. (Koon App. 94a-138a). The opinion of the panel of the court of appeals that reversed the sentence is reported at 34 F.3d 1416. (Koon App. 1a-79a). The order denying rehearing and the dissents of nine circuit judges from the decision to deny rehearing *en banc* as to the sentencing issue is reported at 45 F.3d 1303.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the district court was rendered on August 4, 1993. The circuit court opinion was filed on August 19, 1994. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was timely filed on January 12, 1995. A timely Petition for Writ of Certiorari was granted by this Court on September 27, 1995.

STATUTES AND REGULATIONS INVOLVED

Statutes

Title 28 U.S.C. Section 994(d):

The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider

whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional conditions to the extent that such conditions mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders.

Title 18 U.S.C. Section 3553(b):

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless

the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Title 18 U.S.C. Section 3553(a)(4)(A):

The court, in determining the particular sentence to be imposed, shall consider –

(4) the kinds of sentence and the sentencing range for –

> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28 United States Code, and that are in effect on the date the defendant is sentenced;

Title 18 United States Code, Section 3553(a)(2)

The court, in determining the particular sentence to be imposed, shall consider –

(2) the need for the sentence imposed –

(A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

Title 18 United States Code, Section 3661:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Provisions of the United States Sentencing Guidelines Manual

Chapter 1, Part A, (Introduction), Section 4 (Policy Statement)

Subsections (a) *Real Offense vs. Charge Offense Sentencing* and (b) *Departures* are excerpted at length in the test of the brief that follows.

U.S.S.G. § 2A2.2(a)	Aggravated Assault
U.S.S.G. § 2A2.2(a)(3)	Bodily Injury (from aggravated assault)
U.S.S.G. § 2A2.2(b)(2)(B)	Upward Adjustment for Use of A Dangerous Weapon (Baton)
U.S.S.G. § 2H1.4	Base Offense Level for Violations of Title 18 U.S.C. § 242.
U.S.S.G. § 5H1.1 p.s.	Age (Policy Statement)
U.S.S.G. § 5H1.4 p.s.	Physical Condition (Policy Statement)
U.S.S.G. § 5K2.0 p.s.	Grounds for Departure (Policy Statement)
U.S.S.G. § 5K2.10 p.s.	Victim's Conduct (Policy Statement)

STATEMENT OF THE CASE

Petitioner was charged in Count One of a Two Count Indictment returned on August 4, 1992 with violating Section 242 of Title 18 of the United States Code, in that he "willfully used unreasonable force during the arrest of Rodney Glen King." (J.A. 1).

After a jury trial he was convicted by a general verdict of guilty on Count 1 of the Indictment on April 17, 1993. (J.A. 14).

On August 4, 1993 the district court sentenced petitioner. The court fixed the applicable guideline range at level 27 [70-87 months], and departed downward to level 19 [30-37 months]. The district court selected the low end of the sentencing range and sentenced petitioner to 30

months imprisonment, followed by two years of supervised release, and waived all fines and costs. (J.A. 23).[1]

Thereafter Petitioner appealed the conviction and the government filed a cross-appeal from the sentence to the Ninth Circuit Court of Appeals. The appeals were consolidated with the identical appeal and cross-appeal in the case of petitioner's trial co-defendant, Stacey C. Koon. (J.A. 6).

The Circuit court filed its opinion affirming the convictions of Petitioner (and Koon), and vacating the sentence (for both Petitioner and Koon) and ordering the case remanded to the district court for resentencing. (J.A. 10).

Petitioners then sought rehearing and rehearing *en banc* which the circuit court denied without opinion. Nine judges of the circuit court dissented from the order denying rehearing *en banc* limited to the question that is now before this Court, the propriety of the sentence. (J.A. 11).

On motion of petitioner, the circuit court stayed the mandate pursuant to Federal Rules of Appellate Procedure, Rule 41(b) pending this Court's ruling on his petition for writ of certiorari. On September 27, 1995 this Court granted the petition for writ of certiorari, limited to issue 4 relating to the sentence.

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[1] Although references are to the Joint Appendix, all of these procedural facts are recorded in the published sentencing decision of the District Court, reported at *United States* v. *Koon*, 833 F.Supp. 769 (D.C. Cal. 1993).

SUMMARY OF ARGUMENT

Petitioner urges this Court to establish the proper approach on appeal for reviewing a district court decision to depart from the applicable guideline range. In this case the district court departed downward 8 levels, from level 27 to level 19 and imposed a sentence of 30 months. It departed 5 levels down on the basis of its finding that victim provocation, an "encouraged" ground for downward departure,[2] was present and 3 additional levels on the basis of a combination of three factors that are neither "encouraged" nor prohibited. On appeal to the Ninth Circuit Court of Appeals the sentence was reversed. The circuit court held none of the three factors applied in combination was an "appropriate" basis for departure either alone or in combination with one another, and further held that the district court incorrectly applied the victim provocation guideline encouraging departure to the facts of this case.

The circuit court examined in detail the district court's reasoning and, in effect, substituted its judgment for that of the district court on the question whether the three "combination factors" were "appropriate" grounds for downward departure, in violation of Title 18 U.S.C. § 3553(b) which limits the court in determining if a particular factor is a proper basis for departure to a consideration of only the "sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Petitioner urges this Court to conclude that the three factors, in combination at least, constitute reasons, when

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[2] Pursuant to U.S.S.G. § 5K2.10.

considered together, that justify a district court's departure. Those factors are "additional punishment" these defendants would likely suffer as the result of unique factors present here but absent in the typical case, an absolute lack of any danger posed to the community by the defendant, and the unfairness of the successive prosecution of the defendants by the federal government after acquittals in state court for the identical conduct.[3] Adopting the proper role of the reviewing court, consistent with the dictates of Congress,[4] the approach of the Guidelines themselves,[5] and the prior decisions of this Court,[6] this Court is urged to find that in this case the reasons are appropriate bases to depart or, at least conclude the three level departure is "reasonable" under the rationale of *Williams* v. *United States, supra.*[7]

In addition, the district court properly invoked victim provocation, which is a ground for departure that is specifically articulated in the Guidelines, in U.S.S.G. § 2K2.10. Contrary to the holding of the circuit court, and the argument of the government, the district court did not find that the offense conduct was *not* provoked by the

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[3] Although for a violation of different penal statute.

[4] 18 U.S.C. § 3553(b).

[5] Chapter 1, Part A, Section 4, Subsection (b), United States Sentencing Guidelines Manual; U.S.S.G. § 5K2.0 p.s.

[6] *Williams* v. *United States*, 503 U.S. ___, ___, 117 L.Ed.2d 341, 112 S.Ct. 1112.

[7] "A sentence thus can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive Guideline range are invalid." 503 U.S. ___, ___, 117 L.Ed.2d, at 355.

victim's improper conduct, but only that it was not contemporaneous with it. Both the government (below) and the circuit court engage in elaborate reasoning to support the conclusion that *because* this is a police misconduct case, departure for victim provocation should not have been permitted, *despite* the district court's factual findings that the victim here posed a real and reasonably perceived threat of serious physical harm or death to petitioner Powell, personally, and despite the fact he rose to his feet and charged in petitioner Powell's direction after he was ordered under arrest, and to remain still by a host of armed police officers, and despite the circuit court's acknowledgement that this provocative conduct and the offense conduct all occurred within a matter of seconds.

Finally, this Court is urged to conclude that when a district court is considering what constitutes the "heartland" of an offense[8] for the purpose of determining

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[8] The term "heartland" is not found in the governing statutes, nor is it discussed in Chapter 5 of the United States Sentencing Manual which deal specifically with departures. Rather it is found solely in the Introduction, Chapter 1, Part A, Section 4, subsection (b), *Departures*. There, in the first paragraph, it is said:

> "The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." Excerpt, first ¶, U.S.S.G. § 1A4(b) p.s.

It may also be observed that despite numerous holdings in the circuit courts to the contrary this is clearly not intended as

whether and to what extent departure is warranted in any particular case, the basic approach of the Guidelines

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an *exclusive* rationale for departure. In other words, even a cursory examination of the various grounds encouraged or suggested by the Commission itself for departures establishes that departures are not limited to cases that are, to any reasonable appearance, "atypical." Consider, e.g., departures for "substantial cooperation" which must be viewed as at least a commonplace if not outright typical occurrence. None of the offender based departures encouraged or (at least) permitted, (e.g., age related (5H1.1) or physical impairment related (5H1.4)) by the Guidelines themselves take the case out of the "heartland."

Nor, in the final analysis, do all of the approved (or non-prohibited) offense conduct grounds for departure take the cases out of the "heartland" unless the court adopts a tautological definition for "heartland" according to which anything that permits departure is, *ipso facto*, outside the heartland. This type of definition would be required, e.g., to fit departure for the use or possession of a dangerous weapon under U.S.S.G. § 5K2.6 which specifically encourages substantial upward departure when a firearm is discharged and not otherwise taken into account by the applicable Guidelines. The mere fact that the Guidelines do not take a factor into account, or do not do so to the degree it is present in a given case is not logically or legally equivalent to the fact that the offense conduct is atypical.

In fact, the Commission itself has recognized that its Guidelines are a work in progress, and that as time goes by, the Guidelines will be amended to better reflect what factors take a case outside of the "heartland" and to incorporate reasons courts use to depart where they are recurring. See U.S.S.G. § 1A4(b), 2d ¶ p.s., wherein the Commission candidly concedes "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.

From this it might well be concluded that a departure can be valid *either* where the factor makes the case atypical (the "heartland" analysis); *or* where the basis for departure is specifically encouraged in the Guidelines themselves, e.g., for substantial

requires the court to look at the offense conduct or what the commentary to the Guidelines calls the "real offense" rather than the "charge offense."

Here, looking at the offense conduct, [aggravated assault] (which, after all, *is the consistent focus of the Guidelines*), makes the victim misconduct departure ground obviously appropriate, whereas looking at the "charge offense" [deprivation of civil rights] merely clouds the departure issue.

ARGUMENT

This court should resolve the conflict in the circuits regarding the proper approach to reviewing departures under the United States Sentencing Guidelines, (hereafter "Guidelines") and affirm the district court's 8 level downward departure based on victim provocation (5 levels) and a combination of three non-prohibited, non-enumerated factors (3 levels), where, as here, the findings of fact supporting the departure are supported by the record.

The two issues that are specific to this case are set out in the footnote 2 to the first sentence in Issue 4 in the Petition for Writ of Certiorari. They are:

1) Is departure justified where, as here, it is based on a "complex" or combination of non-prohibited factors, or may the circuit court subject such grounds for departure to

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cooperation or victim provocation, *or* where the district court identifies a factor that is present that is "potentially relevant to a sentencing decision" that the Commission simply did not address.

an "appropriateness" test, not found in the Guidelines?

2) Is a departure for "victim provocation" lawful where, as here, the "offense conduct" is aggravated assault, even though (a) the "crime offense" is wilful deprivation of civil rights, and (b) the provocative misconduct of the victim precedes the offense conduct by a matter of seconds but is not contemporaneous with it?

Petitioner contends the answer to both questions is "yes" and that the district court lawfully based a 3-level downward departure on a unique combination of factors, which, may or may not have justified departure if viewed alone or abstractly, which is how the circuit court viewed them.

Inherent in these questions[9] are three more fundamental questions regarding the depth of oversight circuit courts should exercise when considering a district court's decision to depart.

First: This Court must decide if the circuit courts should develop their own body of departure law establishing fact-based categories of factors upon which departures (upward or downward) will be permitted in a particular circuit, or should the circuit court merely inquire whether the particular ground, or grounds employed by the district court are either explicitly prohibited by the Guidelines, or otherwise precluded by treatment (or adequate treatment) in the Guidelines calculation of the base offense level and adjustments up and

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[9] And thus "fairly included" in them. Supreme Court Rules, Rule 14.1(a).

down to it for relevant conduct, other offense conduct, and offender characteristics.

If this court concludes the circuit's inquiry should be limited to this latter process, it will also compel the conclusion that some or all of the three combined grounds[10] employed by the district court here to depart three levels downward are neither explicitly prohibited, nor otherwise treated (or adequately) treated by the Guidelines.

Second: The district court retains a unique vantage point for evaluating the way factors in a particular case converge and influence one another to form a basis for departure that may not be readily apparent to a reviewing court, or, indeed to another without that unique point of view.

Here, while an abstract analysis of the three "combination factors" used by the district court persuaded the three-judge panel below that none were an appropriate ground for departure, so no combination of them could

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[10] The district court rendered a sentencing decision reported at 833 F.Supp. 769. It identified these three factors, considered together, at pp. 779-780 of Petitioner's Excerpt of Record filed in the circuit court. (References to *this* Petitioner's Excerpt of Record are in the form "(POW. E.R. 12)." The district judge wrote:

> "Koon and Powell have already sustained, and will continue to incur, punishment in addition to the sentence imposed by this court. * * * "Koon and Powell are [not] dangerous or likely to commit crimes in the future, and * * * the successive state and federal prosecutions raise the specter of unfairness." (POW. E.R. 779-780).

justify the three-level departure granted, nine dissenters concluded that:

> "The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of the isolated factor – notwithstanding the fact that none of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review." (*United States* v. *Koon*, 45 F.3d 1303, 1305 (9th Cir. 1995)).

If this court adopts the view that only prohibited factors are invalid reasons for departure, and further accepts the unique role of the sentencing judge in determining the appropriate interplay of such factors when identified as a ground for departure, the three-level departure in this case should be upheld.

Third: The district court also departed five levels downward on the basis of an "encouraged" ground for departure, victim provocation, under U.S.S.G. § 5K2.10, which provides that a departure may be warranted whenever the district court finds the wrongful conduct of the victim "contributed significantly to provoking the offense behavior." The circuit court condemned departure on this ground, despite the district court's carefully documented factual findings that the victim's "wrongdoing precipitated the initial use of force, and thereby substantially

contributed to the offense conduct."[11] The "wrongdoing" found by the district court included the victim's "attempt to escape from police custody" at a time the district court found the officers had not yet used illegal force, and the fact that the victim, an unsearched felony suspect "ran in the direction of Mr. Powell"[12] after he was ordered to get down and remain still.

While at first blush this may appear to be a fact-bound question not worthy of this court's resources,[13] the panel below rejected this basis for departure as an incorrect application of the guidelines for two reasons: (1) the provocative conduct found by the district court was not *contemporaneous* with the assaultive offense conduct; and (2) victim misconduct does not take the case out of the "heartland" of the crime offense – wilful violation of civil rights.

The first rationale for rejecting provocative victim misconduct in this case is remarkable because it is totally unsupported by any authority, or even a fair reading of the Guideline policy statement that encourages a district court to consider downward departure under the circumstances of this case, especially where, as here, the offense conduct followed the wrongful, provocative, conduct of the victim by "only a matter of seconds," as the district court found and the opinion of the panel below concedes.[14]

The second rationale presents a serious policy question – should the "heartland" analysis discussed in the

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[11] POW. E.R. 783.

[12] POW. E.R., 781.

[13] As apparently argued by the United States.

[14] *United States* v. *Koon, supra,* 34 F.3d, at 1458, quoting from *Koon,* 833 F.Supp., at 787.

Guidelines policy statement[15] focus on the "offense conduct" or the "crime offense"?

Petitioner maintains that the circuit court makes a category mistake when it concludes the heartland of criminal civil rights cases (the "crime offense") must be assessed here, rather than the heartland of aggravated assault (the "offense conduct").

If this court concludes the only focus for a "heartland" analysis consistent with the general approach and method of the Guidelines is the "offense conduct," that conclusion will dictate affirmance of the district court's use of victim provocation under U.S.S.G. § 2K2.10 as a valid ground for departure in this present case.

Consideration of the proper role of deference by a reviewing court to the district court's determination of the weight to give a valid ground for departure and the extent to depart, will also compel the conclusion that the degree of departure in the present case was "reasonable"[16] and therefore not an abuse of discretion.

Sub-Issue One

Should the circuit court adopt and apply its own criteria for "appropriate" grounds for departure, or must it affirm any ground for departure that is neither prohibited by statute nor specifically discouraged by the United States Sentencing Guidelines themselves?

In *Williams* v. *United States*, 503 U.S. ___, 117 L.Ed.2d 341, 112 S.Ct. 1112 (1992) this Court considered whether

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[15] Chapter 1, Part A, Ch. 4(b).

[16] See *Williams* v. *United States*, 503 U.S. ___, 112 S.Ct. 1112.

to affirm a sentence where the district court departed in part on valid and in part on invalid factors. Indeed the *Williams* decision provides the most guidance to date regarding, and insight into, the proper analysis of a departure issue under the Guidelines.

Justice O'Connor, writing for the majority,[17] stated that the decision "consider[ed] the scope of appellate review, under the Sentence Reform Act of 1984, of a sentence in which a district court has departed from the guideline sentence." *Williams* v. *United States*, 503 U.S. ___, ___, 117 L.Ed.2d, at 350. The Court held that a district court's use of an invalid departure ground is an appealable "incorrect application of the guidelines" under 18 U.S.C. § 3742(f)(1). *Williams* v. *United States*, 503 U.S., at ___, 117 L.Ed.2d 352.

> "Construing the plain language of the Guidelines Manual and the governing statute, we conclude that it is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already fully considered in establishing the guideline range, or as in this case, on a factor that the Commission has expressly rejected as an appropriate ground." *Williams* v. *United States*, 503 U.S., at ___, 117 L.Ed.2d 353.

Williams, then, established the appropriate role of the reviewing court in an appeal from a District Court departure above or below the guidelines sentence – when the District Court incorrectly applies the Guidelines and

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[17] Justice White dissented and Justice Kennedy joined in dissent.

bases a departure on a factor "the Commission has already fully considered" or "on a factor the Commission has expressly rejected as an appropriate ground."

In the present case, however, the circuit court went far beyond this role in finding the district court erred in basing a three-level downward departure on the combination of three factors. Rather than limiting its inquiry into whether those three factors were either "already fully considered" by the Commission, or "expressly rejected as an appropriate ground" the circuit court here applied its own "appropriateness" test to the three factors and found each of them wanting. The three factors identified by the district court are (1) "additional punishment" appellants would receive on account of their unusual susceptibility to prison abuse and the administrative LAPD proceedings to which they would be subjected; (2) the extreme absence of a need to protect the public from future wrongdoing; (3) the unfairness of the successive state and federal prosecutions for the same conduct.[18]

The panel below claimed to approve of the concept of using three factors in combination to depart, even when any one individually would not justify a departure, but then proceeded to determine that since none of the individual factors was an appropriate basis for departing, the combination of the three could not be, either.

Regarding the first, "additional punishment" factor, the circuit court panel held, "all these consequences could

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[18] This is the circuit court's characterization of the three reasons the district court used, in combination, to justify three levels of downward departure. *United States* v. *Koon*, *supra*, 34 F.3d, at 1452.

be considered 'additional punishment' that flow from conviction, yet seldom can one conceive of a situation in which these consequences form an appropriate basis for granting a departure."

But in reaching this conclusion the Court did not examine or attempt to apply the commentary that the Commission itself gives the courts regarding a district court's departure decisions.

In PART H of Chapter 5 of the Guidelines, for example, the commission explained that it had considered and determined whether certain offender characteristics were "ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." The factors listed in Chapter 5H do *not* include factors the circuit court determines to be "inappropriate." Similarly, Section 2 of PART K of Chapter 5 of the Guidelines deals specifically with "other grounds for departure." That section lists categories of potential departure and expresses the Commission's view on their use to depart up or down. The policy statement contained in § 5K2.0 is instructive.

> "Circumstances that may warrant departure from the guidelines pursuant to this provision[19] cannot by their nature be comprehensively listed and analyzed in advance. * * * Any case may involve factors in addition to those identified

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[19] Title 18 U.S.C. § 3553(b), allowing departure if the district court finds "that there exists an aggravating or mitigating circumstances of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

> that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, *in the discretion of the sentencing court.*" [Excerpt, U.S.S.G. § 5K2.0, p.s. Italics supplied.]

To be sure, "additional punishment" is not listed in the list of prohibited grounds for departure that follows. Nor is it prohibited anywhere by the Commission. The Court relied on the following passage from *United States* v. *Anders*, 956 F.2d 907, 914, *cert. denied*, 113 S.Ct. 1592 (1993):

> "The factors that go into a complex must be those at least authorized, and certainly not expressly prohibited, by the Sentencing Guidelines." *Anders*, 956 F.2d, at 914.

But the Commission explicitly stated that permitted departures fall into *two* categories, those mentioned and guided, and those not mentioned and not guided.

> "It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. * * *
>
> "A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on

> grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside the suggested level is warranted. * * * ." U.S.S.G., Chapter 1, Pt. A., 4.(b) [Policy Statement, *excerpt*, 5th and 6th ¶'s.].

Clearly, district courts are not limited to factors "authorized" by the Guidelines.[20]

The circuit court also relied on a passage from a prior opinion of the Ninth Circuit, *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), *cert. denied*, 113 S.Ct. 438 (1992) where the court listed "factors relevant to sentencing" as including the nature and seriousness of the offense, deterrence of criminal conduct, protection of the public from further crimes by the defendant, correctional treatment of the defendant, the history and characteristics of the defendant, the need to avoid unwarranted sentencing disparities, promotion of respect for the law, and the provision of just punishment. *Koon*, 34 F.3d, at 1453.

The last phrase "provision of just punishment" alone demonstrates the misuse of this litany by the panel below,

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[20] And see U.S.S.G., Chapter 1, Pt. A., 4.(b) [Policy Statement, *Departures, excerpt*, 1st ¶], which states, after listing certain factors explicitly approved for departure.

> "With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."

which was actually taken from a list of goals of the guidelines,[21] and not from a list of criteria to be employed when reviewing departure factors for relevance to sentencing.

It is interesting to note that the authority cited by the circuit court, besides its own prior decisions, is two statutes, 28 U.S.C. § 994(d), and 18 U.S.C. § 3661. But neither of those statutes justify the conclusion reached below, that departures on non-discouraged grounds are "inappropriate" unless they are authorized by Congress.[22]

Section 994(d) specifies that the ". . . Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d).

Title 18 U.S.C. § 3661 provides:

> "No limitation shall be placed on the information concerning the background, character,

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[21] Title 18 U.S.C. § 3553(a).

[22] As the Eleventh Circuit noted in *United States* v. *Mogel*, 956 F.2d 1555 (11th Cir. 1992):

> "In sum, section 994 correlates the penological goals of retribution and general deterrence with the offense-based, or vertical, component of a sentence, and the goals of incapacitation and rehabilitation with the offender-based, or horizontal, component. The Guidelines reflect this basic framework by identifying specific circumstances that affect the offense- and offender-related components of a sentence. * * *
>
> "Finally, and for the present case most significantly, the Guidelines comment on the availability of offender-related characteristics other than criminal history as grounds for departure. See U.S.S.G. Ch. 5, Pt. H." *United States* v. *Mogel, supra*, 956 F.2d, at 1561.

> and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

From these two statutes, the panel below seems to have drawn the inference that Congress established a concrete limitation on the categories of grounds a sentencing judge could rely on in departing downward. Petitioner views these sections as merely prohibiting constitutionally inappropriate bases for any sentencing decision, such as would violate the most fundamental principles of equal treatment under the law[23] and as ensuring that the district court is free, despite the mandatory aspect of the Guidelines, to consider any other factor that is either mitigating or aggravating as a basis for potential departure.

The court below stated that "departures should reflect the defendant's culpability and seriousness of the crime," paraphrasing from the same prior decision.[24] But if that is so, it is the length of sentence that should *reflect* these things, not the bases of the departure. An explicit passage from the Guidelines themselves is instructive in this regard. The "age" policy statement states in pertinent part:

> "Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally *efficient* as and less costly than

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[23] Such as using the defendant's race, sex, or religion as a basis for giving a different sentence.

[24] *Koon*, 34 F.3d, at 1453.

> incarceration." U.S.S.G. § 5H1.1 p.s., excerpt. Italics supplied.

Clearly, the defendant's age or infirmity relates to neither the "defendant's culpability" nor the "seriousness of the crime" and can be said to "reflect" neither. Still, the Commission itself indicated that in some instances age and age-related infirmity may be a basis for a downward departure.

Similarly, the Commission explicitly sanctioned downward departure where the defendant is particularly vulnerable in prison due to physical condition.

> "Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.1 p.s., excerpt.

In the present case the vulnerability of Petitioner in prison, and the likelihood that his prison time would be more difficult or dangerous than the vast majority of other defendants relates not to his *physical* strength or ability, but to his appearance. He is an internationally infamous person as the result of the world-wide publicity this case has received.[25] The district judge was sensitive

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[25] In a discussion that cannot have any relevance whatever to the departure question, the panel below focused on the fact that it was Petitioner's own criminal act that brought this negative publicity to him, and concluded he should, therefore, not

to the fact that as a result of that negative publicity[26] there would be a wide range of prison inmates that would recognize Petitioner as a former police officer (which reasonably makes a prison stay more dangerous for the former officer), and many more, including inmates and guards who would recognize him as the officer that was depicted beating Rodney King on a video tape that saturated the local and national press, and condemn him for the conduct shown on the video tape. The district court in this case cannot be said to have acted unreasonably when it determined that this disability Petitioner would suffer in prison was "extraordinary" when this offender is compared to others.

As noted above, there is another problem with the circuit court invoking its own view of what constitutes an "appropriate" ground for departure. That approach violates the Congressional mandate contained in Title 18 U.S.C. § 3553(b) which limits the court in determining if a particular factor is a proper basis for departure to a consideration of only the "sentencing guidelines, policy

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profit from it in the form of a lower sentence. But, of course, in *every* case, the defendant's criminal conduct is the reason he and potential bases for departure are before the court. By analogy, if a person with an "extraordinary physical impairment" that would justify a downward departure under Section 5H1.4 were the result of an injury sustained in the course of the commission of the crime for which the defendant were being sentenced, that would not change the thrust of the policy statement.

[26] Which the prosecutor mentioned in his argument to the jury, in his "Paris to Tokyo" remark, and which the President of the United States contributed to when he (President Bush) declared the Simi Valley "not guilty" verdicts unjust and promised "justice in federal court" while the streets of Los Angeles burned in the riots that followed the state court acquittals.

statements, and official commentary of the Sentencing Commission."

By claiming to look to statutes and other sources, the circuit court failed to appreciate the main thrust of Section 3553(b) and this court's statement in *Williams, supra,* to the effect that grounds for departure need only be not explicitly prohibited, or not adequately or exhaustively considered and accounted for in the Guidelines themselves.

Applying this standard to the "additional punishment" factor identified by the district court, it is clear the concern was not for a "class" of defendants (police officers) as intimated by the circuit court,[27] but for a unique factor here – the impact world-wide negative publicity would likely have on these particular defendants once they were relegated to a federal prison population. Viewed in this context, guided by the mandate of Section 3553(b), it is clear using this factor was not an incorrect application of the guidelines subject to *de novo* review and reversal.

Similarly, the district court's consideration of its third factor, the "specter of unfairness" these particular defendant's had suffered by virtue of the successive state and federal prosecution, was flawed. The circuit court found that it was not "appropriate" to use this factor, primarily because the successive prosecution was not unconstitutional and it raised no "legitimate sentencing concern".[28]

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[27] The circuit court said this ground of departure was made on the basis of the defendant's membership in the class of police officers. *Koon,* 34 F.3d, at 1454.

[28] *Koon,* 34 F.3d, at 1457. Again, citing *United States* v. *Crippen, supra,* 961 F.2d at 884.

Petitioner contends the government's charging decision is a factor the Guidelines neither adequately account for, nor specifically prohibit, and it must be acknowledged, presents a unique factor in the historical context of this particular case.

In fact, despite its *legality* there is something seriously unsettling about prosecuting a defendant for the identical conduct for which he has already been tried and acquitted. In the present case, that reaction to the federal re-prosecution of these defendants was underscored by the widespread publicity the state trial received, and by the general perception that the state prosecution was conducted in earnest in front of a fairly chosen jury by a dedicated prosecutor who vigorously sought conviction in the courtroom of a widely respected state judge.[29] Indeed, the apparent motivation for the federal prosecution was the *reaction* of the Los Angeles, and the larger community to the state verdicts, and that potentially political motivation does, undeniably, carry with it a specter of unfairness.

Moreover, the import of the district judge's discussion of this sub-factor appears to be the impact that suffering through two widely publicized criminal prosecutions had and would continue to have on the defendants themselves.[30]

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[29] This case carried none of the hallmarks of the post-reconstruction trials of white racists in the south in which white juries acquitted white defendants for crimes committed against black victims with the apparent approval of the (white) state prosecutors, (white) state court judges and (white) state juries.

[30] POW. E.R. 791.

This type of ground for departure is not prohibited by the Guidelines, nor is it accounted for in any of its provisions of policy statements or commentary.

To the extent the Guidelines *do* discuss this type of a factor for departure, they appear to approve of the principle involved. In Chapter 1, Part A, § 4(a) [4th ¶] p.s. the Commission explicitly approves the "use of its departure power" to "control inappropriate manipulation of the indictment." Of course it is clear beyond cavil that the government retains unfettered and unreviewable discretion to make whatever charging decisions it chooses, free from judicial restraint or interference. Nevertheless, it also appears to be clear, from the policy statement quoted, that when a district judge believes the government use of that discretion, while constitutional and legal, contains an element of unfairness, the Commission envisioned that as a proper basis to depart.

Additionally, the point is underscored by the Commissions re-visiting it in its policy statement on *Multi-Count Convictions*.

> "The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the *sentencing court will have adequate power to prevent such a result through departures.*" U.S.S.G., Chapter 1, Part A, Section 4(e). [Italics supplied.]

While it is not contended here that the government did precisely this – unfairly overcharge by multiplying a single count, the district court perceived an element of unfairness in the government charging decision to multiply the prosecutions of the offense conduct herein by

successive federal and state trials after an acquittal in state court. That perception of unfairness in the lawful exercise of the government's charging discretion as the type of ground a district court could use to depart appears to have been both anticipated and approved by the Commission in principle. Certainly, it was not explicitly prohibited.

The circuit court's conclusion this "specter of unfairness" sub-basis for the three-level departure was "inappropriate," should be rejected because this ground for departure is neither prohibited, nor adequately accounted for in the Guidelines, commentary and policy statements, and, to the extent those sources have anything to say, they appear to approve of this type of departure.

Finally, although it may be conceded that the defendant's dangerousness to the community is ordinarily adequately accounted for in the criminal history calculation, this fact was tacitly acknowledged by the district court when it stated the three factors were not, individually, a valid basis for departure, but when considered in combination, they are.[31]

This "combination" analysis is discussed below.

Sub-Issue Two

Is the district court in a unique position to determine that a complex of non-prohibited factors justify departure at a particular level based on how those factors fit together, converge and influence each other?

Former Chief Justice Berger traced the history of federal criminal sentencing in the United States in his

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[31] POW. E.R. at 780:7-9.

opinion in *United States v. Grayson*, 438 U.S. 41, 45-52, 57 L.Ed.2d 582, 586-591, 98 S.Ct. 2610 (1978).[32] His discussion of the rehabilitative model as it contrasts to the retributive and determinate sentence models in some ways foreshadowed the philosophical underpinnings of the modern Sentencing Guidelines, promulgated by the Commission.[33] While *Grayson* affirmed the power of the district court to consider and increase punishment on the basis of a factor that seemed relevant to the appropriate sentence, disparity and dishonesty that resulted from virtually uncontrolled trial court discretion in sentencing and parole commission discretion in release dates led to widespread criticism of the federal sentencing law.

> "Under fire for the ineffectiveness of the federal criminal justice system, Congress set out in 1984 to revamp the federal sentencing scheme. To accomplish this, Congress designated the United States Sentencing Commission ("Commission") as the guiding force in the fight against crime. To execute the task, Congress directed the Commission to establish sentencing guidelines that all federal judges would use in sentencing offenders, in the hope of creating a system in which similar offenses would receive similar punishment. However, questions eventually arose regarding the constitutionality of this new scheme, forcing the Supreme Court to

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[32] Holding a sentencing judge may consider the belief that the defendant lied under oath during the trial as a factor to increase the sentence.

[33] See generally, Guidelines, Chap. 1, Pt. A, § 3, *The Basic Approach* (Policy Statement).

resolve the constitutional legitimacy of the Commission and its function."[34]

In *Mistretta v. United States*, 488 U.S. 361, 102 L.Ed.2d 714, 109 S.Ct. 647 Justice Blackmun[35] noted the historical discretion the sentencing judges enjoyed under a century of indeterminate sentencing in federal cases. (488 U.S. at 363, 102 L.Ed.2d at 725). The nature of the sentencing law, "led almost inevitably to the conclusion on the part of the reviewing court that the sentencing judge 'see more and senses more' than the appellate court; thus, the judge enjoyed the 'superiority of his nether position' for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal." (488 U.S. at 364, 102 L.Ed.2d at 725).

But Justice Blackmun also noted that "[h]istorically . . . the scope of judicial discretion with respect to a sentence is subject to congressional control. Ex Parte United States, 242 U.S. 27, 61 L.Ed. 129, 37 S.Ct. 72 (1916)" (488 U.S. at 364, 102 L.Ed.2d at pp. 725-726).

Because the indeterminate sentencing model, with its concomitant broad discretion for the sentencing judge and parole authority, resulted in "serious disparities in sentences" and its philosophical underpinning, the probability of rehabilitation of most prisoners, came under attack, Congress took two measures designed to remedy the situation.

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[34] Newton, Todd L., *Note, Criminal Procedure – Commentary that binds: The increased power of the United States Sentencing Commission in light of Stinson v. United States, 113 S.CT. 1913 (1993)*, 17 U. Ark. Little Rock L.J. 155.

[35] Writing for eight members of this Court, Justice Scalia alone dissented.

First, it passed the Parole Commission and Reorganization Act in 1976[36] and later passed the Sentence Reform Act of 1984 (hereafter, "SRA"). Ironically, the recognized purpose of the Parole Commission and Reorganization Act was "to moderate the disparities in the sentencing practices of individual *judges*." [Italics supplied.] *United States v. Addonizio*, 442 U.S. 178, 189, 60 L.Ed.2d 805, 99 S.Ct. 2235.

Unquestionably, the twofold purpose of the SRA was to address and ameliorate the "great variation among sentences imposed by different judges upon similarly situated offenders" and to remedy the "uncertainty as to the time the offender would [actually] spend in prison" under a given sentence. *Mistretta v. United States*, 488 U.S., at 366, 102 L.Ed.2d, at 727, 109 S.Ct. 647.

In describing the SRA, Justice Blackmun looked to the Senate Report on the 1984 Legislation, S. Rep. No. 98-225 (1983), and concluded that the system is a "mandatory guideline system." However, Congress "rejected strict determinate sentencing because it concluded that a guideline system would be successful in *reducing* sentence disparities *while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case*. Id. Senate Report, at 78-79, 62." [Italics supplied.] (*Mistretta v. United States*, 488 U.S., at 367, 102 L.Ed., at 727, 109 S.Ct. 647).

The SRA did the following specific things: (1) rejected the rehabilitation model of imprisonment; (2) abolished the U.S. Parole Commission and established the United States Sentencing Commission, and directed the

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[36] 18 U.S.C. §§ 4201-4218.

later to devise guidelines to be used for sentencing; (3) makes all sentences "basically determinate"; (4) makes the Sentencing Commission's guidelines "binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines." 18 U.S.C. §§ 3553(a)(b); (5) it authorized limited appeals, permitting the defendant to appeal a sentence that is above the defined range, the Government to appeal a sentence that is below, and either side to appeal an incorrect application of the guidelines. *Mistretta v. United States*, 488 U.S. at 367-368, 102 L.Ed.2d at 727-728, 109 S.Ct. 647.

It is clear that the SRA did *not* remove all discretion from the sentencing judge. Rather, it merely limited and guided that discretion, as is the traditional role of congress.

But, to the extent that the SRA has retained the flexibility that Justice Blackmun discussed in *Mistretta, supra*, the traditional role and vantage point of the district judge remains important.

The circuits are virtually unanimous in recognizing that the district courts continue to occupy a unique position with regard to the presence and significance of mitigating and aggravating sentencing factors, whether used by the Guidelines as upward or downward adjustments, or used by the district court itself as grounds for departure.[37]

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[37] See e.g., *United States v. Rivera*, 994 F.2d 942, 951-952 (1st Cir. 1993); *United States v. Colon*, 884 F.2d 1550, 1556 (2d Cir.

In the most forceful statement of the point, (then) Chief Judge BREYER observed in *United States v. Rivera*, 994 F.2d 942, 951-952 (1st Cir. 1993):

> "[T]he district court's decision that circumstances are of a 'kind,' or 'degree,' that warrant departure will *not* involve a 'quintessentially legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent. A district court may well have a special competence in making this kind of determination, because it may have a better 'feel' for

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1989) ["Moreover, we have no doubt that the standard for review of departures will evolve over time in a way that requires a showing either of a clear error of law or an abuse of discretion."]; *United States v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990); *United States v. White*, 875 F.2d 427, 431 (4th Cir. 1989) ["A sentencing judge is in "a unique position to carefully examine the particular circumstances of each case"]; *United States v. Nelson*, 918 F.2d 1268, 1273 (6th Cir. 1990) ["But it is precisely the "unusual" case for which departure authority exists. The district courts enjoy a unique role in applying the guidelines. They are responsible for fitting flesh and blood defendants within a theoretical framework that attempts to quantify attitude, behavior, culpability, and a myriad of subjective characteristics objectively. Because that task is so specialized, we think reviewing courts are obliged to give considerable deference to district courts' decisions to depart from the sentence guidelines . . . "]; *United States v. Yanez*, 985 F.2d 371, 374 (7th Cir. 1993); *United States v. Abernathy*, 8 F.3d 30 (9th Cir. 1993) ["Because the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility, the district court's determination is entitled to great deference on review."]; *United States v. Ford*, 989 F.2d 347, 352 (9th Cir. 1993) (citing U.S.S.G. Sec. 3E1.1 application note 5 (1991)); *United States v. Johnson*, 911 F.2d 1394, 1402 (10th Cir.), *cert. denied*, 498 U.S. 1050 (1991).

> the unique circumstances of the particular case before it. A district court is also likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal. *See The Federal Sentencing Guidelines: A Report on the Operations of the Guidelines System* 49, 245 (December 1991) (85% of Guidelines sentences not appealed). To ignore the district court's special competence – about the 'ordinariness' or 'unusualness' of a particular case – would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place. *See* p. 946, *supra*; U.S.S.G. Ch. I, Pt. A intro. comment. (4)(b). *Thus, appellate courts should review the district court's determination of 'unusualness' with 'full awareness of, and respect for, the trier's superior "feel" for the case,' Diaz-Villafane, 874 F.2d at 50, not with the understanding that review is 'plenary.' Contra* United States v. Carr, 932 F.2d at 72; United States v. Pozzy, 902 F.2d at 138."

Even the circuit that reversed the present sentence is sharply divided about the degree of deference to be shown to the district court in the area of departures. As Judge Noonan wrote in *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991):

> In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge,

and influence each other that will lead to the correct decision. *Cook*, 938 F.2d at 153.

This Court is urged to conclude that while the current federal law of sentencing clearly limits the area in which the district judge may exercise discretion, where the trial judge does so, its vantage point and perspective will still, under the Guidelines, often uniquely qualify that judge to determine (1) whether aggravating or mitigating factors warranting departure are present; and (2) the extent of departure that is warranted based on those factors identified.[38]

In the present case, then, this Court is urged to adopt the view of *Rivera* and *Cook* in evaluating departures based on the district court's perception that a combination of unique factors justify a sentence outside the applicable guideline range.

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[38] Once the Court has identified one, or more than one, lawful basis for a downward departure, the Court may determine the degree of departure that is appropriate based on *all* the facts and circumstances in the case, whether or not each would justify a departure if considered alone. In *United States v. Cook*, 938 F.2d 149 (9th Cir. 1991), the Court of Appeals held that a "unique combination of factors" may constitute a "mitigating circumstance" which would justify a downward departure, even though no single factor would justify a departure when considered alone. *Id.* at 153; *accord United States v. Anders*, 956 F.2d 907, 911 (9th Cir. 1992); *United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992); *see also United States v. Sklar*, 920 F.2d 107, 117 (1st Cir. 1990) ("We do not mean to imply . . . that factors, inadequate to warrant departure when taken in isolation, may not in combination suffice to remove a case from the heartland . . . "). Such a departure may be appropriate when " 'a court finds an atypical case,' one 'where conduct significantly differs from the norm.' " *Cook*, 938 F.2d at 153 (quoting U.S.S.G. Ch. 1, Pt. A, § 4(b)).

Sub-Issue Three

When the circuit court reviews the application of an "encouraged" ground for departure, should it focus on the "real offense" or "charge offense" in determining if the case is in the "heartland" as that term is used by the United States Sentencing Commission?

In this case the district court followed the mandate of the Guidelines in fixing the applicable guideline sentencing range by beginning with a base offense level of 15 for the "offense conduct" of aggravated assault under U.S.S.G. § 2A2.2; adding 4 levels for the use of a dangerous weapon (baton);[39] increasing the offense level 2 more levels for bodily injury;[40] and *then adding 6 additional levels for the violation of the "charge offense" 18 U.S.C. § 242.*[41]

In concluding that the district court erred in departing downward the circuit court erroneously focused on the "charge offense" of violation of civil rights. But the district court clearly did not depart downward 5 of the 6 levels in the Guidelines sentence solely based on a finding that the victim provocation took this case out of the heartland of that charged offense.

Rather, the central focus of the Guidelines, as set forth in the introductory policy statement is to look to the actual conduct of the defendant, rather than merely

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[39] U.S.S.G. § 2A2.2(b)(2)(B).

[40] U.S.S.G. § 2A2.2(b)(3)(A).

[41] U.S.S.G. § 2H1.4(a)(2) relating to wilful deprivation of civil rights.

looking to the crime charged in the abstract.[42] Moreover, the *base offense level* is always obtained under the Guidelines by looking first to Chapter two - Offense Conduct.

This focus of the Guidelines calculation of the sentence first on the actual offense conduct, and determining the sentence primarily on that conduct is the reason that the most significant element of the Guidelines sentence in this case is the base offense level of 15, for aggravated assault.

As is discussed below, the district court properly found that the permitted (or encouraged) ground for departure of victim misconduct was present in this case, and that it was a proper basis for a 5 level downward departure here.

The circuit court's conclusion that this was an incorrect application of the guidelines was predicated on its view that this case should be seen as a civil rights case for the purpose of departure.[43]

But the Guidelines make no such stipulation.

Rather, the Guidelines permit the district court to treat each element of the sentence as either falling within,

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[42] See generally, U.S.S.G., Ch. 1, Pt. A, Section 4, *The Guidelines' Resolution of Major Issues (Policy Statement)*, Subsection (a) *Real Offense vs. Charge Offense Sentencing*. "The guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of guns, or the amount of money actually taken . . . "

[43] *Koon*, 34 F.3d, at 1459-1461.

or falling outside of the heartland of that type of offense conduct.[44]

Here, if the "heartland" analysis focuses on the aggravated assault element of the sentence, the victim provocation is a proper basis (in principle) for departing, since it is an encouraged ground for departure in assault cases, *and* the degree of departure (5 levels out of the 15 levels for the aggravated assault element of the Guidelines sentence) appears eminently reasonable.

Moreover, this departure does no violence to the extra punishment the Guidelines, and Congress (apparently) called for in cases of criminal violation of civil rights, because the departure for the atypical aspect of the assault element of this case leaves the additional 6 level upward adjustment to the Guidelines sentence based on the civil right violation undisturbed. This additional sentence for that element of the offense conduct completely answers the circuit court's concerns that a downward departure for the provocation which takes the assault element of the case out of the heartland will circumvent the intended punishment for the civil rights violation. *That* element of the offense conduct was considered by the Commission and petitioner received the additional 6 level upward adjustment for it.

Turning to the victim provocation departure, it appears to be clearly within the anticipated downward

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[44] Thus, the circuit courts have approved downward departures where a particular sentencing adjustment "overstates the seriousness" of the offense as to the conduct of a particular defendant. See e.g. *United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991); *United States v. Roe*, 976 F.2d 1216 (9th Cir. 1992); (2) *United States v. Lawrence*, 916 F.2d 553, 555 (9th Cir. 1990).

departure under the Guidelines section that specifically identifies it as a ground for departure, and set out the factors to consider in deciding whether and to what degree departure is warranted in a particular case.

In this case, if the conduct of the victim may be viewed as mitigating, it would appear to be an excellent factor to serve as a basis for departure, precisely because the Guidelines do not include any specific adjustments for victim conduct that is mitigating.

Under the general principles set forth above, then, victim conduct that mitigates the "offense conduct" in this case would appear to fit into the rationale of 18 U.S.C. § 3553(b):[45]

> " . . . as a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines" (See also U.S.S.G. § 5K2.10 (Policy Statement) [same].)

Since the mitigating circumstance of victim conduct is not "taken into consideration" at all in computing the Guidelines Sentence, it clearly is a legitimate basis for downward departure.

Moreover, the Guidelines Commission specifically authorized downward departure on the basis of victim conduct. U.S.S.G. § 5K2.10 provides:

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[45] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." [Italics supplied.]

"If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics in comparison to those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented."

In this case the district court departed on the basis of the fact the Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. The government did not seriously contend that Mr. King's conduct was lawful. The evidence presented at trial established that Mr. King was not merely that of a "disrespectful and obstreperous drunk." He was acting in a manner that far exceeded such benign conduct. In fact, the district court concluded, based on the trial evidence that:

1. Mr. King acted in a dangerous manner in his conduct of recklessly evading detention and arrest by

driving at high rates of speed to avoid being stopped at all by the police. This conduct was life threatening.

2. Did not obey police commands to submit to police authority.

3. Resisted lawful arrest to such an extent that (it is undisputed) the police *lawfully* used deadly force, in the form of a taser to subdue him.

4. Even after being tased, he posed a perceived danger to Defendant Powell, by continuing to refuse to obey police commands, by refusing to submit to arrest, and by actively resisting arrest.[46]

5. During this period, he posed a physical threat to Defendant Powell by getting up and running in his direction. "He then rapidly rose to his hands and knees, and to his feet. He turned, outstretched his arms forward, and charged towards Officer Powell."

All of this conduct was engaged in by a person who was, in fact, a convicted felon, who had not been searched, and who the district court found officers could reasonably believe was on PCP.[47] This wrongful conduct of the victim forms a powerful basis for a downward departure in this case under the factors listed in § 5K2.10. Looking at those listed factors in turn, they each support the district court's decision to departure.

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[46] "He resisted and became combative, forcing the officers to retreat." POW E.R. 753.

[47] "[B]ecause of Mr. King's erratic and recalcitrant behavior." POW E.R. 756.

The "size and strength" of Mr. King at the time of the offense conduct in this case was referred to by the district court in its findings of fact.[48]

Moreover, another "relevant physical characteristic" in this case includes the fact that he was tased, but could still control his motor functions, get up, and charge Defendant Powell.

At the very least, the reasonable perception of one in Defendant Powell's position would be that Mr. King possessed remarkable physical strength after apparently (at least) being tased by Sgt. Koon.

Again, there is little doubt that in this case Mr. King "persisted" in his dangerous actions. He did not yield during a high speed auto chase, and he continued to resist arrest as police commands and use of force escalated. Defendant Powell did approach Mr. King to cuff him prior to the point at which Mr. King arose. If he had succeeded in cuffing Mr. King, the confrontation that included the "offense conduct" would have been avoided.

Given the information Defendant Powell had about Mr. King's ability to, and apparent determination to, effectively continue to resist lawful commands of the police both before and after the taser was used, Defendant Powell "reasonably perceived" that he was very dangerous. This perception was, reasonably, heightened by two factors: (i) an objectively reasonable assumption by a police officer in Defendant Powell's position that Mr. King was under the influence of PCP, or some similar

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[48] "Mr King was appreciably larger than both Koon and Powell . . . he was a felony suspect." POW E.R. 782.

stimulant; (ii) Defendant Powell's role in the arrest of Mr. King.[49]

Considering the potential that Mr. King was possessed of chemically enhanced strength and resolve, Defendant Powell could reasonably have perceived his conduct to pose a very serious threat of harm to him and his fellow officers.

Furthermore, considering the fact that when he is acting lawfully, properly, and within L.A.P.D. policy, an officer in Defendant Powell's position is not trained to act unilaterally, but is trained to rely in large measure on information being relayed to him by the Sergeant in charge of the arrest, Defendant Powell would reasonably have perceived Mr. King to be very dangerous indeed, since Sgt. Koon was yelling to him to administer more and more frequent baton blows to Mr. King to subdue him.

Mr. King was an unsearched felon, on parole, who was willing to endanger lives in order to evade arrest while in his car, who withstood a taser charge, who persisted in disobeying police commands despite the presence of a sizable number of uniformed, armed police officers, who physically resisted arrest, and who was

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[49] As discussed below, the uncontroverted evidence at trial was that when an unsearched suspect is resisting arrest, it is the responsibility of the ranking officer to take charge of the scene, and it is the responsibility of the officers actually effecting the arrest to rely on information given to them by the officer in charge from a more objective vantage point.

capable and willing to stand up from a prone position and move in the direction of officer Powell.[50]

Mr. King "actually presented" a danger to appellant. Despite repeated commands to him and the lawful use of the very formidable device of a taser gun, Mr. King refused to comply, or to show his hands, or keep them away from his mid-section where he could have concealed a weapon. Clearly, in the situation confronting the defendants, the lack of knowledge that Mr. King was not armed, and his conduct in preventing the officers from searching him, and preventing the officers from immobilizing his hands (by cuffing, e.g.) substantially contributed to the danger he and his conduct presented.

In addition, his "bizarre" behavior, such as dancing and acting in a boisterous, disrespectful, and obstreperous manner also contributed to the danger he presented *in light of the other facts discussed above*. This conduct by a detainee who was very actively resisting lawful arrest in the early moments of the police encounter would make any person in Defendant Powell's position extremely wary since it made Mr. King appear to be not only dangerous, but especially dangerous because he was unpredictable. He acted in a way that was irrational,[51] and simply strange.[52]

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[50] Again, the district court identified this factor in its *Sentencing Memorandum*, 833 F.Supp. 769.

[51] If only because he appeared to be willing to resist arrest against great odds of numbers of police officers.

[52] This behavior was so "bizarre" and potentially dangerous that CHP officer Melanie Singer, in the early stages of the encounter with King, found it necessary to draw her weapon.

Such conduct may always be said to be unsettling, but when it is manifested by a man who has already engaged in life threatening behavior (recklessly evading the police), who has also taken a taser jolt and gotten back up on his feet within seconds, this strange conduct would be more than merely unsettling, it would be reason to fear that man as a substantial danger.

Again, Judge Reinhardt's dissent demonstrates that the panel opinion is in error in too narrowly construing the reach of that section which specifically authorizes downward departure on this ground. The panel decision below is directly in conflict on this point with the Eighth Circuit's opinion in *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). There, the court found the victim's behavior which preceded the violent assault of the victim (stabbing) to have justified the district court in departing substantially below the applicable guideline sentence.

In that case the defendant was convicted of stabbing the victim in the chest with a nine inch knife requiring emergency medical attention and hospitalization.

The district court imposed a fifteen month sentence for the crime of assault resulting in life threatening injuries with a dangerous weapon. This was a substantial departure below the applicable guideline range and it was imposed on the basis of the victim's antecedent conduct under U.S.S.G. § 5K2.10 (Policy Statement), which defendant here also relies upon.

While characterizing the victim's conduct as "consensual sexual foreplay" the government appealed the sentence asserting that the district court's departure from the Guidelines was (1) based on clearly erroneous factual

findings; (2) based on mitigating factors adequately taken into account by the Guidelines; and (3) unreasonable. (*United States v. Yellow Earrings, supra,* 891 F.2d 650, 651-652) The Court held:

> "The Government contends that the district court improperly considered victim conduct as a mitigating factor warranting departure. Specifically, the Government contends that the Guidelines permit departure only for wrongful victim conduct and then only to the extent merited by the factors set out in section 5K2.10. According to the Government, Struder's conduct fails to satisfy either criteria. The Government's arguments to this effect border on the frivolous."

The activity that provoked the stabbing in *Yellow Earrings, supra,* was not contemporaneous with the crime. Nor did the crime follow immediately after the provocation. Rather, the sexually offensive remarks of the victim were made prior in time to his return to the room where the defendant had armed herself with a large knife, and stabbed him. The government argued there that since the offense was not immediately tied up with the offense, it was not provoked by the conduct within the meaning of U.S.S.G. § 5K2.10. The Eighth Circuit rejected this argument, finding that the offense was provoked by the antecedent activity, even though it had ceased when the crime was occurred. The circuit court improperly acted as a fact finder in determining that the antecedent behavior of Mr. King did not provoke the criminal activity of the defendant – despite the district court's conclusion it did.

In fact, by focusing on a finding of the trial court that at the time of the offense conduct, Mr. King "was no longer resisting arrest . . . [and] posed no objective threat,

and the defendant's had no reasonable perception of danger" (34 F.3d, at 1458) the panel opinion looked to the wrong facts. That conclusion is the *only reason* the District Court found the conduct of appellant to be criminal. It does not justify the further conclusion (reached by the panel) that the offense conduct was not provoked within the meaning of § 5K2.10. If Mr. King were resisting arrest or posing an objective threat or reasonable perception of danger, there would have been no crime at all. No where does the guideline require a "reasonable perception of danger" before a finding of victim provocation is appropriate.

There can be no doubt that the parallels between the cited case and the present case are substantial. The Court in *Yellow Earrings* noted:

> "The above evidence demonstrates that Struder, at the very least, pushed Yellow Earrings, verbally abused her and attempted to publicly humiliate her when she refused his request for sexual intercourse. In addition, Yellow Earring's personal recounting of the incident strongly suggests that had Struder accepted "no" for an answer in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." 891 F.2d at 650.

Clearly, the events that were held "provocative" of the offense conduct, preceded it. Just as clearly, here as in the cited case, the offense conduct flowed from lawful conduct that responded to the victim's improper conduct, and it can be said that if Mr. King had responded to the lawful commands of the officers "in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." This is not an argument that the officer's conduct was excused, but it is one that the panel did

not take account of in rejecting the District Court's bases for downward departure, despite the citation of *United States v. Yellow Earrings, supra,* by the District Court and petitioner.

Clearly, the language of the Guidelines policy statement itself fits the facts of this case, and the provocative conduct of the victim here substantially provoked the offense conduct. As such, the departure of 5 levels was both lawful and "reasonable" under the circumstances of this case.

CONCLUSION

This Court is urged to conclude that a district court may base a departure on any ground not prohibited by the Guidelines, or not fully considered by the Commission in promulgating them. Here, that rule permitted the district court to use the four grounds identified because the first three were not prohibited, and at least two of them were not considered at all.

In addition, although much of the discretion, and thus opportunity for disparity has been removed by the Guidelines, the district court retains both an area of discretion and a unique vantage point for exercising that discretion in the area of departure, and in determining how and to what extent a factor or combination of factors unique to the case before it mitigates to the point that a sentence outside the applicable guideline range is warranted. Here, the district court did not abuse his discretion in reasonably departing downward three levels based on the combination of the unique mitigating factors he identified in his sentencing opinion.

Finally, when the focus of the "heartland" analysis is properly directed to the offense conduct element of the guidelines to which it relates, it is clear that the mere fact that the "charge offense" in this case is a criminal civil rights violation does not preclude victim misconduct downward departure. Since here, the district correctly applied that encouraged ground for downward departure, and further since the degree of departure is reasonable in light of the significant provocative conduct and the level of departure (5 of 15 levels assigned to that element of the Guidelines sentence), the departure on that ground should also be affirmed.

Respectfully submitted,

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